RECORD AND BRIEFS

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Nos. 15-105,
14-1418, 14-1453, 14-1505, 15-35, 15-119, 15-191

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLO., ET AL.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE ORTHODOX JEWISH RABBIS IN SUPPORT OF PETITIONERS

HOWARD N. SLUGH
Counsel of Record
2400 Virginia Ave., N.W
Apt. C619
Washington, D.C. 20037
(954) 328-9461
hslugh1@gmail.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Rabbi Mitchell Rocklin is a member of the Executive Committee of the Rabbinical Council of America ("RCA"), the largest organization of Orthodox rabbis in the United States. He has experience as a congregational rabbi and a U.S. Army Reserve chaplain. As a chaplain tending to practitioners of diverse faiths, he has witnessed a wide variety of sincerely held religious beliefs and the profound importance many Americans place on their observance. He recognizes the necessity of protecting all such beliefs.

Rabbi Steven Pruzansky is the spiritual leader of Congregation Bnai Yeshurun, a synagogue consisting of nearly 600 families in Teaneck, New Jersey. He has served as a Vice President of the RCA.

Rabbi Dov Fischer is the spiritual leader of a synagogue in Irvine, California. He is a member of the Executive Committee of the RCA.

These amici maintain that while the respondents' interpretation of the Religious Freedom Restoration Act risks curtailing every American's religious liberty, it poses a heightened risk to practitioners of minority religions such as Orthodox Judaism. They are dedicated to protecting the religious liberty of

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[1] Pursuant to SUP. CT. R. 37.3(a), amici certify that all parties have given blanket consent to the filing of amicus briefs in support of any party. Pursuant to SUP. CT. R. 37.6, amici certify that no counsel for any party has authored this brief in whole or in part, no party or party's counsel has made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel has made such a monetary contribution.

their congregants as well as religious adherents nationwide.

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act ("RFRA") was intended to "provide very broad protection for religious liberty," *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014), and to apply in "all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb. In furtherance of that goal, the statute prohibits the government from substantially burdening a religious adherent's religious exercise unless doing so is necessary to further a compelling government interest. *Id.* § 2000bb-1.

This case turns on what it means to "substantially burden a person's exercise of religion." One interpretation—adopted by this Court in *Hobby Lobby*—is that a law imposes a substantial burden on the exercise of religion if it inflicts significant legal consequences on a religious person for following his faith. 134 S. Ct. at 2778–79.

A second interpretation—favored by the respondents and some lower courts but previously rejected by this Court—is that a law imposes a substantial burden if it requires a religious person to violate his faith in a significant manner. *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1177 (10th Cir.), *cert. granted sub nom. Southern Nazarene Univ. v. Burwell*, 136 S. Ct. 445 (2015) and *cert. granted in part sub nom. Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 136 S. Ct. 446 (2015).

Thus, the petitioners' interpretation requires courts to weigh legal burdens, while the respondents' interpretation requires courts to weigh theological burdens.

The respondents' construction of RFRA would effectively negate this Court's decision in *Hobby Lobby* by requiring courts to ask whether a religious objector properly understood his own sincerely held religious beliefs—a "question that the federal courts have no business addressing " *Hobby Lobby*, 134 S. Ct. at 2778. There is no reason for this Court to reverse its precedent by allowing courts to second-guess religious adherents' sincerely held beliefs. Such a reversal would dramatically weaken RFRA's protection of religious liberty.

This is particularly true for minority religious adherents, such as Orthodox Jews, whose religious practices are not widely known or understood. For instance, during a recent oral argument, a Fifth Circuit judge cited turning "on a light switch every day" as a prime example of an activity that would not, in the judge's view, constitute a substantial burden on someone's religious exercise. Oral Argument at 1:00:00, *East Texas Baptist Univ. v. Burwell*, 793 F.3d 449 (5th Cir. Apr. 7, 2015), *available at* goo.gl/L50Gt1. That judge was evidently unaware that most Orthodox Jews consider the use of electricity on Saturday to be a desecration of the Sabbath. This innocent mistake demonstrates the dangers inherent in asking judges to resolve questions that require parsing Americans' diverse and complex religious beliefs.

The respondents' briefing further highlights the unworkability of their proposed rule. They frame the

petitioners' religious objection to the Accommodation[2] as a desire to prevent the government from providing their employees with contraceptives. Brief for the Respondents in Opposition at 13, *Zubik v. Burwell*, 136 S. Ct. 444 (2015) (Nos. 14-1418, 15-191). The respondents then rely on the fact that the petitioners' objection allegedly relates to the behavior of a third party to claim that the religious burden placed on the petitioners themselves is insubstantial. *Id.* at 15–17. The petitioners disagree. They maintain that complying with the Accommodation amounts to "their own participation in a religiously impermissible activity," and that the religious burden imposed by that mandatory participation is indeed substantial. Reply Brief of Petitioners at 4, *Zubik*, 136 S. Ct. 444 (No. 14-1418).

There are no objective criteria that this Court could use to determine which of these competing theological claims is correct. This Court should not adopt an interpretation of RFRA that would require judges to attempt such an impossible task. This is especially true when an alternative interpretation—already endorsed by this Court—avoids such problems entirely.

The Tenth Circuit's decision offers a practical example of the perils inherent in the respondents' test. That court refused to protect the Little Sisters' religious liberty because it found their explanations regarding the nature and significance of their religious beliefs "unconvincing." *Little Sisters*, 794 F.3d at 1191.

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[2] The Health and Human Services Accommodation ("Accommodation") is an alternate option—available to religious employers—for complying with the government mandate requiring employers to provide their employees with insurance coverage for abortifacients, contraceptives, and sterilization procedures.

Judges who dismissed Catholic beliefs as "unconvincing" are at least as likely to reject or misinterpret the tenets of more obscure faiths.

Orthodox Jews are a minority within a minority in America. Many Americans, including judges, are not familiar with their religious practices. For Orthodox Jews, sinful behavior includes writing, cooking, traveling a great distance, or using electricity on the Sabbath; creating hybrid plants or animals; wearing a garment made from both wool and linen; shaving with a razor; and cutting one's sideburns too short.

A judge unfamiliar with Orthodox Jewish theology might mistakenly think that an Orthodox Jew would suffer only insubstantial harm if he were required to violate any one of these religious requirements. Such an outcome would be inconsistent with RFRA's plain text, this Court's precedent, and Congress's intent to protect religious minorities.

The respondents maintain that, rather than second-guessing the petitioners' sincerely held religious beliefs, the lower courts rejected their understanding of the interaction between those beliefs and the Accommodation. Brief for the Respondents in Opposition at 16–18, *Zubik*, 136 S. Ct. 444 (Nos. 14-1418, 15-191). This is a distinction without a difference.

In order to conclude that the Accommodation does not substantially burden the petitioners' religious beliefs, a court must necessarily make determinations regarding both the Accommodation and the petitioners' religious beliefs. *See, e.g.*, *Geneva Coll. v. Secretary U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 436 (3d Cir.), *cert. granted in part sub nom. Zubik v. Burwell*, 136 S. Ct. 444 (2015) and *cert. granted sub nom. Geneva Coll. v. Burwell*, 136 S. Ct.

445 (2015) (noting that the court was evaluating "the nature of the claimed burden *and the substantiality of that burden on the appellees' religious exercise*") (emphasis added). Without reaching conclusions regarding both items, a court could not possibly determine how substantially they interact with one another.

The difficulty that exempting the petitioners will allegedly cause the government may help the respondents carry their burden of proving that the law is necessary to further a compelling government interest, 42 U.S.C. § 2000bb-1(b), but it should not allow courts to avoid scrutinizing the Accommodation entirely.

ARGUMENT

I. As a Minority Within a Minority, Orthodox Jews Will Experience Deprivations of Their Religious Liberty If Judges Second-Guess Their Sincerely Held Religious Beliefs.

Approximately 6.7 million Jewish people live in the United States. Luis Lugo, *et al.*, *A Portrait of Jewish Americans: Findings from a Pew Research Center Survey of U.S. Jews* at 25 (Oct. 1, 2013), *available at* goo.gl/eQlgU9 (last visited Dec. 16, 2015). Only ten percent of those 6.7 million, or around 670,000, belong to the Orthodox denomination. *Id.* at 10.

Orthodox Jews adhere to religious requirements that are unfamiliar to most Americans, including many Jews belonging to other denominations. Some of these practices might appear trivial or insubstantial to a religious outsider. Nevertheless, those seemingly inconsequential practices play an essential role in the religious life and identity of Orthodox Jews.

It is understandable and predictable that judges would lack expertise regarding Orthodox Jews' religious obligations. During a recent oral argument, a judge on the Fifth Circuit chose turning "on a light switch every day" as a prime example of an activity that would not constitute a substantial burden on someone's religious exercise. Oral Argument at 1:00:00, *East Texas Baptist Univ.*, 793 F.3d 449 (5th Cir. Apr. 7, 2015), *available at* goo.gl/L50Gt1. But to an Orthodox Jew, turning on a light bulb on the Sabbath could constitute a violation of a biblical prohibition found in Exodus 35:3.

That a judge, in attempting to find an activity that no one would find religiously objectionable, inadvertently selected an activity which could constitute a grave sin for an Orthodox Jew, exemplifies how ill-equipped judges are to adjudicate questions of religious belief. This highlights the harm likely to befall Orthodox Jews and other practitioners of minority religions if judges are tasked with undertaking such inquiries.

Previously, a prison unsuccessfully attempted to satisfy its religious liberty requirements by feeding Orthodox Jews "vegetarian" and "nonpork" meals rather than meals certified as kosher. *Ashelman v. Wawrzaszek*, 111 F.3d 674, 675 (9th Cir. 1997), *as amended* (Apr. 25, 1997). It would diminish Orthodox Jews' religious liberty if a judge could deny a request for kosher food because, in his opinion, nonpork meals are "kosher enough" to avoid imposing a substantial burden on religious exercise. That is precisely the rule for which the respondents are advocating.

Many similar examples in which judges would be poorly positioned to weigh the importance of an Orthodox Jewish practice could arise. For instance, Orthodox Jews consider wearing a garment made from both wool and linen to be a sin. To avoid transgressing this prohibition, Orthodox Jews check labels and sometimes send clothes to specialists who can determine if even a small amount of both materials is present. *E.g.*, *Shatnez-Free Clothing*, CHABAD.ORG, goo.gl/RZRcSm (last visited Dec. 17, 2015). A rule requiring Orthodox Jewish prisoners or public school students to wear clothing containing a tiny amount of wool and linen may seem innocuous, but it would require them to violate a biblical commandment.

Orthodox Jews also observe strict requirements regarding shaving. They believe that it is forbidden to shave one's face with a razor blade or to trim one's side burns shorter than a certain length. *See* Leviticus 19:27 The Jewish philosopher Maimonides explained that these prohibitions are related to avoiding idolatry. *E.g.*, Eli Touger, *The Prohibition Against Shaving the Edges of One's Head*, CHABAD.ORG, *available at* goo.gl/N2Te11 (last visited Dec. 17, 2015). Orthodox Jews have sought and received exemptions from rules relating to shaving. *E.g.*, *Litzman v. NYPD*, 2013 WL 6049066 (S.D.N.Y. Nov. 15, 2013) (exempting an Orthodox Jewish police officer from the New York Police Department's shaving policy).

Numerous everyday activities such as writing, cooking, or driving a car constitute a desecration of the Sabbath according to Orthodox Jewish practice. In fact, picking flowers, removing bones from fish, and gathering sticks in an open field may each qualify as a violation of the fourth of the Ten Commandments. In biblical times, such a violation merited the death penalty. Numbers 15:32–36. It is unreasonable to ask judges who are unlikely to share, or even be aware of, these beliefs to weigh the substantiality of the burdens placed upon sincere religious believers.

Orthodox Jews have long felt at home in America because its robust protections for religious liberty have never discriminated against minority practices. A rule requiring judges to adjudicate questions of religious doctrine is incompatible with this admirable history, risks limiting the guarantee of religious liberty only to the most well-known and well-accepted religious practices, and threatens to make America a less tolerant and welcoming nation.

II. This Court Should Confirm Its Prior Holdings and Clarify that Determining Whether a Law Places a Substantial Burden on Religious Exercise Does Not Require Judges To Question Religious Practitioners' Sincerely Held Beliefs.

In *Hobby Lobby*, this Court rejected an argument indistinguishable from the argument advanced by the respondents. 134 S. Ct. at 2777–79. In that case, the government argued that the "the connection between what the objecting parties must do and the end they find morally wrong is simply too attenuated" to constitute a substantial burden. *Id.* at 2777. This Court rejected that argument and refused to "tell the plaintiffs that their beliefs are flawed," describing the inquiry proposed by the government as a "question that the federal courts have no business addressing " *Id.* at 2778. The only factor that the Court considered was the size of the fines that Hobby Lobby would face if it refused to comply with the government regulation. *Id.* at 2779. Those fines were large, and therefore, the regulation imposed a substantial burden.

The respondents have not offered any compelling reason why this Court should abandon the approach it adopted in *Hobby Lobby*. That test complies with RFRA's plain text and has proven workable in practice. *See, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853 (2015). This Court should apply the test it articulated in *Hobby Lobby*, and find that the Accommodation places a substantial burden on the petitioners' exercise of religion because it requires them to either forsake their religious obligations or pay large fines.

A. The Religious Freedom Restoration Act Protects All Religious Exercise, No Matter How Obscure.

RFRA was intended to "provide very broad protection for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2760. This understanding is consistent with the text of the statute as well as Supreme Court precedent. *See, e.g., id.*

The statute's "declaration of purposes" expresses Congress's desire that "governments should not substantially burden religious exercise without compelling justification." 42 U.S.C. § 2000bb. The statute indicates that it applies "in all cases where free exercise of religion is substantially burdened." *Id.* In order to ensure that the statute would protect even the most obscure or idiosyncratic religious practices, Congress defined "exercise of religion" to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5. Congress further instructed that this language "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* § 2000cc-3(g). RFRA's text requires that the government refrain from substantially burdening any religious exercise, rather than a privileged few, unless it can demonstrate a compelling justification. *Id.* § 2000bb-1.

The rule advocated by the respondents undermines RFRA's broad sweep by limiting its coverage to those religious exercises that judges deem substantial enough to protect. Unpopular or minority beliefs—the ones most likely to need protection from majoritarian impulses—are the beliefs most likely to be left unprotected under the respondents' standard.

B. Congress Did Not Authorize Judges To Rule on the Validity of an Adherent's Understanding of His Own Religious Practices.

The respondents argue that RFRA's restriction on "substantially burdening religion" empowers courts to determine "as a legal matter" whether an adherent's religious objection is "substantial" enough to qualify for protection. *See* Brief for the Respondents in Opposition at 16–17, *Zubik*, 136 S. Ct. 444 (Nos. 14-1418, 15-191); Brief for the Respondents at 16, *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 136 S. Ct. 446 (2015) (Nos. 15-105, 15-119) (endorsing the "substantial burden analysis" utilized by the Tenth Circuit). Under this interpretation, if a court determines that a religious objector has overestimated the significance of his own religious beliefs, the government is excused from showing a compelling justification for a law.

The respondents' rule creates two interrelated dangers. First, it invites courts to interpret an adherent's religious beliefs in a manner that makes sense to themselves rather than accepting the objections formulated by the objectors. *See, e.g.*, *Little Sisters*, 794 F.3d at 1191 (noting that the court finds the Sister's explanation of their religious objections "unconvincing"). Second, it invites courts to weigh the importance of an adherent's religious beliefs however they are formulated. *See, e.g.*, *Geneva College*, 778 F.3d at 436 (noting that the court would determine the "substantiality of [the] burden on the appellees' religious exercise").

An understanding of RFRA that would require courts to make such determinations is unworkable

and plainly wrong. This Court's current interpretation that RFRA's protections apply whenever a law threatens a religious objector with a substantial punishment is the better interpretation. *Hobby Lobby*, 134 S. Ct. at 2779.

i. In Order To Determine Whether a Law Imposes a Substantial Burden on Religious Exercise, Courts Should Examine the Burden Imposed on Adherents Who Refuse To Follow the Law Rather Than Attempt To Adjudicate Religious Beliefs.

In order to establish that a law imposes a substantial burden on religious exercise, RFRA only requires courts to determine whether the adherent's religious claims reflect an " 'honest conviction' " and whether the government-imposed consequences of violating the law are significant. *Id.* (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)). In *Hobby Lobby*, this Court concluded that "[b]ecause the contraceptive mandate forces [plaintiffs] to pay an enormous sum of money if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Id.* The exact same description applies in this case.

In *Holt v. Hobbs*, this Court reaffirmed that judges have no role in questioning the merits of a religious individual's sincerely held beliefs. 135 S. Ct. 853 (2015). The Court refused to consider various theological arguments as to why requiring a Muslim prisoner to shave his beard did not constitute a substantial burden on his religious exercise. *Id.* at 862–63. A

lower court had found that the prisoner's religious exercise was not substantially burdened by the prison's beard policy for three reasons: "his religion would 'credit' him for attempting to follow his religious beliefs;" he exercised his religion in other manners; and other Muslim men were willing to shave. *Id.* This Court rejected each of those arguments, noting that the burden was substantial because "if petitioner contravenes that policy and grows his beard, he will face serious disciplinary action." *Id.* at 862.

This Court should reaffirm the rule that a law places a substantial burden on religious exercise whenever it imposes a significant penalty on a religious person for refusing to violate a religious dictate.

ii. The Respondents Inadvertently Highlight the Danger Posed by Their Interpretation of RFRA by Urging the Court To Replace the Petitioners' Stated Religious Beliefs with the Government's Own Understanding of Those Beliefs.

The petitioners and the respondents disagree over the nature of the petitioners' religious objections. If this Court repudiates its former holding and adopts the respondents' interpretation of RFRA's substantial burden requirement, it will have to resolve this theological dispute. Such esoteric theological matters are beyond the Court's competency.

The respondents claim that the petitioners object to "the government arranging for third parties to provide" their employees with contraceptive coverage. *See, e.g.*, Brief for the Respondents in Opposition at 14, *Little Sisters*, 136 S. Ct. 446 (Nos. 15-105, 15-119). The respondents choose this formulation in order to

minimize the petitioners' role in sinful behavior and thereby diminish the gravity of their religious objection.

The petitioners describe this as a mischaracterization of their religious beliefs, and insist that their religious objection is to "the actions that HHS would compel" them to take. Reply Brief of Petitioners at 4, 7, *Little Sisters*, 136 S. Ct. 446 (No. 15-105). According to the petitioners, participating in the Accommodation is religiously impermissible because it would "make them morally complicit in sin," "contradict their public witness to the value of life," and "immorally run the risk of misleading others."[3] Brief of Appellants at 18, *Little Sisters*, 794 F.3d 1151 (No. 13-1540).

The respondents are aware that the petitioners claim to object to the requirements actually imposed upon them by the Accommodation, but they dismiss those objections and focus on the fact that complying with the Accommodation does not result in the provision of contraceptives. Brief for the Respondents in Opposition at 16–20 & n.11, *Zubik*, 136 S. Ct. 444 (Nos. 14-1418, 15-191). The government's inability to understand or accept the nature of the petitioners' religious objections highlights the difficulty inherent in adjudicating religious beliefs.

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[3] Orthodox Jews observe similar prohibitions against creating the appearance of religious impropriety. Those prohibitions apply even in situations where judges might determine that there is little risk of misleading others. According to the Talmud, the authoritative collection of Jewish legal commentary for Orthodox Jews, the prohibition against acting in a manner that may mislead others applies even in the privacy of one's home. Babylonian Talmud, Sabbath 64b.

Catholics and Catholic ideas are by no means uncommon in America. If the government cannot understand the nature and diversity of Catholic religious objections, how could it possibly appreciate the comparably obscure objections that might be raised by Orthodox Jews?

Many people know that Orthodox Jews are prohibited from eating mixtures of milk and meat, but fewer understand that they are also forbidden from cooking such a combination for consumption by others. Babylonian Talmud, Hullin 115b. A prison official might echo the strategy followed by the respondents in this case, and reformulate the objections of an Orthodox prisoner asking for exemption from cooking milk and meat as a mere objection to having third parties eat such a mixture. Just as in this case, the religious adherent would claim to object to personal sinful conduct, and the government would claim that he is objecting to the actions of a third party. In such a case, how could a judge possibly determine the true nature of the religious requirement, let alone measure its importance?

Interpreting RFRA to require judges to weigh the significance of a religious objection would necessarily require courts to answer doctrinal questions about the nature of sin which cannot be answered using any sort of objective criteria. Therefore, this Court should continue interpreting RFRA to apply whenever a religious adherent faces substantial legal consequences for following his faith rather than the law.

iii. Interpreting the Interplay Between a Law and the Petitioners' Religious Obligations Is Indistinguishable from Rejecting the Petitioners' Understanding of Their Religious Commitments.

In an approach that the respondents echo in their Opposition, the Tenth Circuit attempted to distinguish this case from *Hobby Lobby* and *Holt* by stating that it was evaluating "how the law or policy being challenged actually operates and affects religious exercise" rather than the underlying religious exercise. *Little Sisters*, 794 F.3d at 1177 But its discussion highlights why this distinction is illusory in practice. An analysis of the interplay between laws and religious beliefs inevitably requires a court to evaluate the nature and importance of the relevant religious beliefs.

In order to determine how a law interacts with a religious obligation, a court must necessarily establish the bounds of both the law and the religious obligation. Having established such boundaries, itself an impossible task, the court would next be required to somehow assess the amount of burden caused when a law impacts behavior within the boundaries of a religious obligation. There are no objective legal criteria that suggest how such an assessment might be accomplished. That is why the question of how a law "affects religious exercise" is precisely the "question that the federal courts have no business addressing "
Hobby Lobby, 134 S. Ct. 2751 at 2778.

The Tenth Circuit found the petitioners' arguments "unconvincing" because, in its opinion, comply-

ing with the Accommodation would not cause the Little Sisters to transgress the religious prohibitions they cited. *Little Sisters*, 794 F.3d at 1191. The court listed several reasons for this conclusion. In each instance, the court claimed that it was merely interpreting the regulation, but each reason required it to reach philosophical and theological conclusions as well as legal ones.

The court below held that, for example, complying with the Accommodation would not cause the petitioners to transgress the prohibition on complicity because "the purpose and design of the accommodation scheme is to ensure that plaintiffs are not complicit " *Id.* This explanation only supports the conclusion that the petitioners are mistaken about their complicity if, as a theological matter, the Accommodation achieved the goals it was allegedly intended and designed to accomplish.

Regardless of the government's intent, an accommodation telling Orthodox Jewish prisoners that they can shave with electric shavers rather than traditional razors would not lessen the burden on the prisoners' religious exercise if the particular electric shavers also fell into the prohibited category. Rabbi Moshe Heinemann, *Electric Shavers*, STAR-K ONLINE, goo.gl/1Yimw0 (last visited Dec. 17, 2015). After all, RFRA expressly protects religious exercise from laws that unintentionally impose burdens. 42 U.S.C. § 2000bb-1. Determining whether the Accommodation accomplished its alleged aims necessarily required the court to reevaluate the Little Sisters' sincerely held religious beliefs. That analysis is impermissible under this Court's precedent.

The lower court also stated that the plaintiffs do not risk misleading others by complying with the Accommodation, since doing so is a form of objection. *Little Sisters*, 794 F.3d at 1191. This conclusion, however, itself requires a court to determine the level of risk of confusion that is religiously permissible. The court may conclude that complying with the Accommodation is unlikely to mislead others, but it cannot conclude that there is no risk whatsoever. If Catholic nuns believe that even a small or theoretical risk is religiously impermissible, judges are in no position to contradict them.

The Tenth Circuit also found that the Accommodation does not impose a substantial burden, since it allows the petitioners to continue speaking out against the regulation. *Id.* This is no different than the suggestion in *Holt*, that the religious burden was insubstantial because the prisoner could pursue his religious exercise through alternative means. *Holt*, 135 S. Ct. at 862. This Court rejected that argument in *Holt* and there is no reason to accept it here.

The Tenth Circuit's decision below held that the "*de minimis*" and "minimal" nature of the tasks required by the Accommodation meant that it could not substantially burden the petitioners' religious exercise. *Little Sisters*, 794 F.3d at 1192. In doing so, the court equated the amount of effort required to perform a task with its religious significance. There is no basis for such a conclusion.

Indeed, to an Orthodox Jew, many effortless tasks, such as turning on a light on Saturday, wearing a garment made of wool and linen, or shaving with a razor are violations of biblical commandments. The

correlation, if any, between the amount of effort required to complete a task and its religious significance is a theological matter, not a legal one.

iv. An Accommodation that Itself Requires the Petitioners To Violate Their Religion Cannot Meaningfully Protect Their Religious Liberty.

The respondents claim that the Accommodation is an "appropriate means of accommodating religious objections while also protecting other important interests." According to the respondents, the Accommodation strikes the appropriate balance between countervailing interests in a "pluralistic society." Brief for the Respondents in Opposition at 15, *Little Sisters*, 136 S. Ct. 446 (Nos. 15-105, 15-119).

An accommodation only strikes the sort of balance referenced by the respondents if it actually exempts the religious adherent from objectionable behavior. A religious person's interest can hardly be said to have been honored by an accommodation when the accommodation *itself* violates his religious liberty. In such a case, the so-called "accommodation" would pay mere lip service to religious objections while prioritizing the competing interests. RFRA's requirements cannot be satisfied by such an ineffective attempt at protecting religious exercise.

For example, requiring an Orthodox Jewish prisoner to fill out a form requesting kosher food would likely constitute a reasonable accommodation. It would exempt him from the objectionable behavior of eating non-kosher food without substituting a second religiously objectionable behavior in its place. However, requiring that same prisoner to fill out the exact

same form on Saturday would not amount to a reasonable accommodation, since it would merely replace the objectionable behavior of eating non-kosher food with the objectionable requirement of desecrating the Sabbath by writing.

The respondents argue that if religious adherents object to facilitating the government's efforts to achieve its policy goals, it may have a hard time doing so. Brief for the Respondents in Opposition at 20–22, *Zubik*, 136 S. Ct. 444 (Nos. 14-1418, 15-191). While such an argument is clearly relevant to the government's burden of showing that there is no less restrictive method of accomplishing its compelling interest, the argument has no logical connection to the distinct question of whether a statute places a substantial burden on a religious adherent.

C. Deferring to the Petitioners' Understanding of Their Religious Beliefs Does Not Necessarily Exempt Them from the Law. It Merely Shifts the Burden To the Government To Demonstrate that the Law Is Necessary To Further a Compelling Government Interest.

Once a court accepts that a law substantially burdens a person's religious exercise, the government can defend the law at issue by showing that it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

This is the stage of a case where courts should consider arguments such as those posed by the respondents about the difficulties the government may

face if the Accommodation is deemed impermissible. Brief for the Respondents in Opposition at 16–17, *Zubik*, 136 S. Ct. 444, (Nos. 14-1418, 15-191). The challenges the government faces in instituting an accommodation has no bearing on the burden that a religious adherent will face in the absence of such an accommodation.

Perhaps the actions required by the Accommodation are so minimal that there is no less restrictive way for the government to satisfy its aims.[4] If that is the case, the government may be able to carry its burden. However, courts should not avoid making those determinations by dismissing religious people's sincerely held beliefs as insubstantial.

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[4] Although such a conclusion is unlikely given this Court's order in *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014) and the Eighth Circuit's persuasive analysis in *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, 801 F.3d 927, 943–46 (8th Cir. 2015), this brief takes no position on the ultimate disposition of that question.

CONCLUSION

For the foregoing reasons, the judgments of the Courts of Appeals for the Third, Fifth, Tenth, and District of Columbia Circuits should be reversed.

Respectfully submitted,

HOWARD N. SLUGH
Counsel of Record
2400 Virginia Ave., N.W
Apt. C619
Washington, D.C. 20037
(954) 328-9461
hslugh1@gmail.com

Counsel for Amici Curiae

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